

Outside Counsel

Basics of Fair Labor Standards Act's Requirements and Exemptions

It is common for employers to want to pay their employees a flat salary, without tracking hours or paying overtime wages. Paying employees salary only provides employers with month-to-month predictability and stability in their payroll, in addition to lessening the burden of monitoring and policing employee work hours. Employees often also would prefer to be paid a salary, and receive a “guaranteed paycheck,” rather than have their pay fluctuate based on the number of hours worked in a particular pay period. With initiatives at both the state and federal level to increase the mandatory minimum wage, employers may be further tempted to adopt a flat salary for their employees.

In structuring their compensation programs, however, employers should be cognizant of the fact that, with the exception of certain categories of “exempt” employees, the Fair Labor Standards Act (FLSA) requires employers to pay overtime wages for all hours worked in excess of 40 per week by an employee, regardless of the agreement reached between the parties. There are many common misconceptions concerning who is covered by the FLSA and what the act requires of employers. It is thus incumbent upon employers, and counsel representing them, to closely analyze whether each of their employees qualifies for one of the limited exemptions under the FLSA, before agreeing to pay the employee a salary as opposed to paying that employee hourly up to 40 hours, and then time-and-a-half for overtime.

Exempt Duties

The exemptions to the FLSA are designed to carve out from the act's protections employees who historically earn well above the minimum

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wage and perform the types of work that both do not fit neatly into a standardized schedule and cannot easily be passed off from one employee to another at the end of an eight-hour shift.¹

An employee can be treated as an exempt employee under the FLSA only if the employee qualifies under one of the exempt duties tests. Exempt duties categories include executive, administrative, professional, computer and outside sales employees. Congress provided little guidance as to the limits of each of these exemptions, and instead delegated authority to the Secretary of Labor to do so by regulation.² Courts are directed to apply these exemptions narrowly so as to give the FLSA's overtime wage requirements broad applicability, and employers bear the burden of proving that an exemption applies.³ There is voluminous authority, both regulatory and judicial, addressing the scope of each of these exemptions. Thus, below is merely a brief overview of each.

Executive Exemption. To qualify for the executive exemption, an employee's primary duties must be managing either the company or a recognized department or division of the company. Additionally, the employee must supervise the work of at least two other full-time employees and must have input that is afforded particular weight with respect to hiring, firing and promotion of employees. An employee does not qualify for the executive exemption merely because there are employees lower than him or her in the company's hierarchy. To qualify, the

employee's primary duties must be managerial in nature.

An employee can also qualify for the executive exemption if he or she is a “business owner,” meaning that he or she owns at least 20 percent of the employer company, and is actively engaged in management of the company.⁴ High-level executive employees were not historically subject to the types of abusive wage practices that the FLSA is designed to prevent, and carving such “business owners” out of the act's protections clearly meets the goals of the exemptions generally.

Administrative Exemption. To qualify for the administrative exemption, an employee's primary duties must be to perform office or non-manual work directly related to the management or general business of the company, and must include the exercise of discretion and independent judgment on significant matters. Administrative employees work in areas related to running or servicing the business, as opposed to producing the business' product or services. An employee's duties must involve “the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.”⁵

While higher level review of an employee's decisions or judgment will not automatically exclude the employee from the administrative exemption, the Secretary of Labor notes that generally to qualify, the employee must have some authority “to make an independent choice, free from immediate direction or supervision.”⁶ Determination of whether an employee qualifies for the administrative exemption is fact-intensive and requires a detailed analysis of the particular employee's duties and responsibilities.

The administrative exemption is also available with respect to employees performing administrative functions directly related to an academic institution or training in an educa-

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tional establishment.⁷

Professional Exemption. An employee can qualify for the professional exemption if he or she is either a “learned professional” or a “creative professional.”

To be a “learned professional,” an employee’s primary duties must require advanced knowledge in a field of science or learning that is “customarily acquired by a prolonged course of specialized intellectual instruction.”⁸ Additionally, as with the administrative exemption, to qualify as a “learned professional,” an employee must exercise a level of discretion and independent judgment.⁹ Recognized fields of science and learning include law, medicine, accounting and the like. When analyzing whether an employee qualifies as a “learned professional” courts place particular emphasis on the amount of specialized academic training that is required for the position.

Thus, for example, within the field of medicine, some courts have held that medical technicians and paramedics are not exempt, while nurses and athletic trainers are, based on the level of advanced educational training necessary for the respective positions.¹⁰

To qualify as a “creative professional,” an employee’s primary duties must require “invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.”¹¹ Recognized fields include “music, writing, acting, and graphic arts.”¹²

Computer Employee Exemption. The computer employee exemption is available for an employee who “is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker whose primary duty” falls within the regulatory framework for a computer employee.¹³ Unlike some of the other exemptions, there is no requirement that an employee’s work require the exercise of independent judgment or discretion, or that the employee has obtained advanced education to qualify for the computer employee exemption. Instead, the analysis focuses on the employee’s actual job duties.¹⁴

Outside Sales Employee Exemption. An employee whose “primary duty is...making sales” and who “is customarily and regularly engaged away from the employer’s place of business in performing such primary duty” may be classified as exempt under the outside sales employee exemption.¹⁵

Demonstrative of how fact-intensive and complex application of the Labor Department’s regulations to a specific case can be is the recent Supreme Court decision in *Christopher v. Smithkline Beecham*.¹⁶ The issue in

Christopher was whether pharmaceutical sales representatives qualify for the outside sales employee exemption, where they were primarily engaged in obtaining nonbinding commitments from physicians to prescribe particular drugs.

The Labor Department filed an amicus curiae brief urging that such employees are not exempt because a “sale” requires actual transfer of title to the property at issue. In a 5-4 split, a divided Supreme Court rejected the department’s argument and held that pharmaceutical sales representatives do qualify as outside sales employees. Thus, not only is application of the exemptions often complex and fact-intensive, but the conclusion is not always clear cut, and even well-intentioned employers may end up misclassifying employees.

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Combination Exemption. Finally, even if none of the specific exemptions apply, “an employee performing duties that fall under more than one individual exemption, none of which separately represents her primary duty, may be exempt under the combination exemption if those duties, when combined, constitute her primary duty.”¹⁷

Minimum Compensation

In addition to qualifying under one of the exempt duties tests, to be an exempt employee under the FLSA, with limited exception,¹⁸ an employee must receive guaranteed minimum compensation. For purposes of the executive, administrative and professional exemptions, the guaranteed minimum compensation under the FLSA is at least \$455 per week.

For purposes of the computer employee exemption, an employee may be paid on either a salary or an hourly basis. To qualify, the employee must receive either a guaranteed minimum weekly compensation of \$455 or, if compensated on an hourly basis, at least \$27.63 per hour to be considered an exempt employee.

New York State Labor Law. The New York Labor Law also mandates overtime pay and applies the same exemptions as the FLSA.

Under the labor law, however, the guaranteed minimum compensation for the executive and administrative exemptions is \$543.75 per week, and there is no salary requirement for the professional exemption.¹⁹

Conclusion

While employers and employees may agree that flat salary compensation is more desirable than hourly compensation with overtime pay, employers and their counsel should be careful to ensure that their pay practices comply with the requirements of the FLSA. An unwitting employer who fails to pay non-exempt employees overtime wages may be subjected to the FLSA’s harsh damages, which include not only actual unpaid wages, but statutory liquidated damages and attorney fees as well.

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1. *Pippins v. Lambert*, 2012 U.S. Dist. LEXIS 17918, *64 (S.D.N.Y. Nov. 30, 2012).
 2. 29 U.S.C. §213(a)(1).
 3. See *Pippins v. KPMG*, 2012 U.S. Dist. Lexis 173918, *65 (S.D.N.Y. Nov. 29, 2012).
 4. U.S. Dept. of Labor, Wage and Hour Division Fact Sheet #17B.
 5. 29 C.F.R. §541.202(a).
 6. 29 C.F.R. §541.202(c).
 7. U.S. Dept. of Labor, Wage and Hour Division Fact Sheet #17C.
 8. 29 C.F.R. §541.301(a).
 9. Id. at §541.301(b).
 10. See *Vela v. City of Houston*, 276 F.3d 659, 675 (5th Cir. 2001).
 11. 29 C.F.R. §541.300(a)(2)(ii).
 12. Id. at §541.302(c).
 13. 29 U.S.C. §213(a)(17).
 14. *Clarke v. JPMorgan Chase Bank*, 2010 U.S. Dist. LEXIS 33264, **46-48.
 15. 29 U.S.C. §§541.500(a)(1)-(2).
 16. 132 S.Ct. 2156, 183 L.Ed.2d 153 (2102).
 17. *IntraComm v. Bajaj*, 492 F.3d 285, 294 (4th Cir. 2007).
 18. The exceptions to the minimum guaranteed salary requirement are for outside or commission sales employees, teachers, and practitioners of law and medicine.
 19. 12 NYCRR §142-2.14(c)(4).